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No. 03-1566

In the
Supreme Court of the United States

FRANCIS A. ORFF, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CENTRAL SAN JOAQUIN WATER CONSERVATION DISTRICT* IN SUPPORT OF PETITIONER

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[Continued from Cover]

BRIEF AMICI CURIAE OF

ENTERPRISE IRRIGATION DISTRICT,
KLAMATH BASIN IMPROVEMENT DISTRICT,
KLAMATH DRAINAGE DISTRICT,
KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY,
KLAMATH IRRIGATION DISTRICT,
MALIN IRRIGATION DISTRICT,
MIDLAND DISTRICT IMPROVEMENT COMPANY,
PINE GROVE IRRIGATION DISTRICT,
POE VALLEY IMPROVEMENT DISTRICT,
SHASTA VIEW IRRIGATION DISTRICT,
STOCKTON EAST WATER DISTRICT,
SUNNYSIDE IRRIGATION DISTRICT,
TULELAKE IRRIGATION DISTRICT, AND
WESTSIDE IMPROVEMENT DISTRICT

QUESTION PRESENTED

Amici curiae will address the following question:

Are farmers intended third-party beneficiaries of their irrigation district's water service and repayment contracts with the U.S. Bureau of Reclamation and, therefore, entitled to sue Reclamation for breach thereof, as the Federal Circuit has long held?

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Amici curiae submit this brief supporting petitioners;[1] all parties have consented to its filing. *See* S. Ct. Rule 37.3.

INTERESTS OF AMICI CURIAE

Amici curiae consist of fifteen water-management districts (Districts) in Oregon and California that receive water stored by the Bureau of Reclamation in its Klamath and Central Valley Projects. *Amici curiae* are the: Central San Joaquin Water Conservation District; Enterprise Irrigation District; Klamath Basin Improvement District; Klamath Drainage District; Klamath Hills District Improvement Company; Klamath Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Poe Valley Improvement District; Shasta View Irrigation District; Stockton East Water District; Sunnyside Irrigation District; Tulelake Irrigation District; and Westside Improvement District.

All of these Districts, *amici curiae*, contract with the Bureau of Reclamation (Reclamation) for delivery of project water to the end users—farmers on tens of thousands of acres of high-value agricultural land; the farmers all possess a property right to receive the water from the Reclamation

[1] No counsel for any party to the case authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* contributed financially to the preparation of this brief. *See* S. Ct. Rule 37.6.

projects. All of these Districts presently have suits pending against the United States under the Tucker Act in the U.S. Court of Federal Claims, seeking monetary damages for breach of their water service contracts or for payment of just compensation, in a representative capacity on behalf of their water users. Reclamation's failure to deliver this water to the Districts has caused the Districts to seek monetary damages in the U.S. Court of Federal Claims under the Tucker Act for breach of the water deliver contracts or for the unconstitutional taking of their water rights. *See Klamath Irrigation Dist. v. United States*, No. 01-591L (Oct. 11, 2001); *Stockton East Water Dist. v. United States*, No. 04-541L (April 20, 2004).

How this Court defines intended third-party beneficiary status could have a profound effect on the rights and obligations of all Reclamation Act project contract holders, including *amici curiae*. Reclamation has constructed more than 600 dams and reservoirs in 17 Western states. Of these, Reclamation administers 348 reservoirs with a total storage capacity of 245 million acre-feet, providing one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland (on which they produce 60 percent of the nation's vegetables and 25 percent of its fruit and nuts). *See* Bureau of Reclamation, *About Us*,

http://www.usbr.gov/main/about/ (last visited November 22, 2004).

SUMMARY OF THE ARGUMENT

At issue in this case is whether water users, who receive water from a U.S. Bureau of Reclamation (Reclamation) water project pursuant to a contract between Reclamation and an irrigation district, are the intended beneficiaries of that contract and therefore, entitled to sue for breach of contract damages under it. This case asks the Court to pick between decisions of two Circuit Courts of Appeal, reversing a Ninth Circuit Court of Appeals decision, *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004), and adopting the Federal Circuit's analysis set forth in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984).

In *H.F. Allen Orchards*, the Federal Circuit concluded that the water users were the intended third-party beneficiaries of the contracts between Reclamation and the water district. The trial court had dismissed a suit brought by 160 water users as third-party beneficiaries of irrigation districts' contracts with Reclamation on two grounds: (1) lack of third-party beneficiary status; and (2) lack of merits. *See H.F. Allen Orchards v. United States*, 4 Cl. Ct. 601 (1984). The Federal Circuit reversed on the first holding, but affirmed on the second:

> The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court "every action shall be prosecuted in the name of the real party in interest." Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest.

Id. at 1572-73, 1576; *see also Henderson County Drainage Dist. No. 3 v. United States*, 53 Fed. Cl. 48 (2002) (holding that individual farmers were third-party beneficiaries to a contract entered into between their drainage districts and the United States).

The minority view, represented by the Ninth Circuit's decision in *Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004), reached a different conclusion, holding that the water users were not the intended third-party beneficiaries of the contract between Reclamation and the water district. *Id.* Not only is the *Orff* decision at odds with decisions from the Federal Circuit, it is at odds with other Ninth Circuit cases involving the same contract and same farmers. *Compare Orff v. United States*, 358 F.3d 1137 (9th Cir. 2004) *with Barcellos & Wolfsen v. Westlands Water District,* 899 F.2d

814, 816 (9th Cir. 1990) (holding water users were third-party beneficiaries under irrigation districts' contracts with Reclamation); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 731-33 (E.D. Cal. 1993) (recognizing plaintiffs landowners as third-party beneficiaries to the 1963 and 1965 contracts between the United States and Westlands).

As the Federal Circuit correctly concluded in *H.F. Allen Orchards*, the historical context of these water delivery contracts and the statutory structure of the Reclamation Act force an inexorable conclusion that the end water users are the intended third-party beneficiaries of these water delivery contracts. Any other result would be untenable because the subject matter of the contract, the right to receive the water, is held by the water user. Indeed, as the U.S. Department of Interior has repeatedly observed, under state law, neither the water district nor Reclamation can own the water right because they do not put the water to beneficial use; rather, the water right resides in the water user, who most typically is a farmer who puts the water to beneficial use by irrigating his farm crops.

The ability of water users to seek damages for the government's refusal to deliver their water to them under the contract is crucial because in recent years, Reclamation has adopted policies that favor use of the water for environmental

objectives (such as protecting endangered fish) over the contractually intended delivery of the water to farmers for agricultural use. As a result, increasingly, Reclamation chooses to dramatically reduce or not deliver any water at all to the water districts, leaving the water users, farmers, with no water with which to grow their crops. Yet, it is the farmers themselves, and not the water districts, that ultimately suffer when the government breaches the water delivery contracts.

Amici curiae urge this Court to adopt the rule of law set forth by the Federal Circuit, recognizing that landowners do have the right to sue as third-party beneficiaries of irrigation contracts. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984). The Federal Circuit observed that irrigation districts act as a "surrogate for the aggregation of farmers" and that their constituents are the true parties in interest in this type of litigation. *Id.* In upholding the right of the water user to sue individually, the Federal Circuit followed established precedent of this Court and reclamation jurisprudence. *See, e.g., Ickes v. Fox*, 300 U.S. 82 (1937); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nevada v. United States*, 463 U.S. 110 (1983). Accordingly, the Ninth Circuit's deviation from traditional notions of water (property) rights and reclamation law should be reversed.

ARGUMENT

I. The Structure of the Reclamation Act and the Historical Context in Which the Contracts Were Entered Into, Support the Federal Circuit's Conclusion That the Water Supply Contracts Between the Bureau of Reclamation and Irrigation Districts Were Intended To Benefit the End Water Users.

The contract under scrutiny in this case is a highly specialized agreement, the terms of which are largely dictated by the federal Reclamation Act of 1902. The two entities that entered into the contract, the Bureau of Reclamation and the Westlands Water District, owe their existence to the reclamation laws passed by Congress and 17 Western states. These water delivery and repayment contracts, including the one at issue in this case, can be understood only in the historical and legislative framework in which they were forged.

On the numerous occasions on which this Court has been called upon to interpret the provisions of the Reclamation Act of 1902, 32 Stat. 388 (1902), the Court has repeatedly noted the role that statute played in transforming the arid West from desert into a vast region of fruitful family farms:

> In order to correctly ascertain the meaning of the Reclamation Act of 1902, we must recognize the obvious truth that the history

of irrigation and reclamation before that date was much fresher in the minds of those then in Congress than it is to us today. "[The] afternoon of July 23, 1847, was the true date of the beginning of modern irrigation. It was on that afternoon that the first band of Mormon pioneers built a small dam across City Creek near the present site of the Mormon Temple and diverted sufficient water to saturate some 5 acres of exceedingly dry land. Before the day was over they had planted potatoes to preserve the seed." During the subsequent half century, irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community. By the turn of the century, however, most of the land which could be profitably irrigated by such small-scale projects had been put to use. Pressure mounted on the Federal Government to provide the funding for the massive projects that would be needed to complete the reclamation, culminating in the Reclamation Act of 1902.

California v. United States, 438 U.S. 645, 648-49 (1978) (citations omitted).

> [W]ith the passage of the Reclamation Act of 1902, the Federal Government was designated to play a more prominent role in the development of the West. That Act directed the Secretary of the Interior to withdraw from public entry arid lands in specified western States, reclaim the lands through irrigation projects, and then to restore the lands to entry pursuant to the homestead laws and certain conditions imposed by the Act itself.

Nevada v. United States, 463 U.S. 110, 115 (1983) (citation omitted).

In enacting the Reclamation Act, "Congress set forth on a massive program to construct and operate dams, reservoirs, and canals for the reclamation of the arid lands in 17 Western states." *California*, 438 U.S. at 650. A "revolving fund was established with moneys received from the sale of public lands, and the Secretary of Interior was directed to survey the west and locate and construct irrigation projects, opening up the improved lands to settlement under the homestead laws . . . . Construction costs were to be repaid into the fund by the settlers and landowners in ten annual installments without interest." Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. L. Rev. 464, 465 (1960).

Indeed, as the Ninth Circuit stated,

> The Congress that enacted the Reclamation Act of 1902, however, had far greater expectations for the program than simply an increase in the West's agricultural production. With the Reclamation Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which that plan would be carried out.

Peterson v. United States Dep't of Interior, 899 F.2d 799, 802 (9th Cir. 1990).

Under the Reclamation Act, as originally conceived, the Bureau of Reclamation dealt directly with the farmers, delivering water to them and collecting repayments of the cost of constructing the project facilities. The parties soon realized, however, the significant benefits of organizing a "water users association," the forerunner of the modern water district.[2]

Congress then authorized Reclamation to contract with districts rather than individual users, and, in the Omnibus Adjustment Act of 1926,[3]

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[2] The Act of May 15, 1922, provides in pertinent part:

> That in carrying out the purposes of the Act of June 17, 1902 . . ., and Acts amendatory thereof and supplementary thereto, and known as and called the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of landowners and entrymen, in the discretion of the Secretary of the Interior, may be dispensed with . . . .

42 Stat. 541 (1922) (codified in 43 U.S.C § 511).

[3] The Omnibus Adjustment Act of May 25, 1926, provides in pertinent part:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of

> required that all future contracts be made only with irrigation districts. Thus, users now receive reclamation project water through an intermediary, which may be an irrigation district, a conservancy district, a water user's association, or some other form of organization.

Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 387-88 (1997).

> Originally, the Department of the Interior was given responsibility not only for constructing the reclamation projects, but also for administering the distribution of water to agricultural users in a project service area. In 1926, however, Congress amended the reclamation laws to remove from the Department the primary responsibility for distributing water and monitoring its use. Omnibus Adjustment Act § 46, 43 U.S.C. § 423e. Instead, the Secretary of the Interior was directed to enter into long-term water service contracts

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> the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the execution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. . . .

Omnibus Adjustment Act of May 25, 1926, ch. 383, § 46, 44 Stat. 636 (1926) (codified in 43 U.S.C. § 423e (2004)).

> with irrigation districts organized under state law. It was left to the individual districts to execute subcontracts with the actual users of water and to deliver the water.

Peterson v. United States Department of the Interior, 899 F.2d 799, 804 (9th Cir. 1990).

To enable water users in reclamation projects to comply with the new requirement that they contract through districts, in 1917, the California legislature enacted a statutory authorization for the creation of water districts, such as Westlands and some of *amici*, for the express purpose of entering into contracts with the Bureau of Reclamation for delivery of water to their water users and collecting the payments due to Reclamation.

> Districts may cooperate and contract with the United States under the Federal Reclamation Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto or any other act of Congress heretofore or hereafter enacted permitting cooperation.

Cal. Water Code § 23195 (2004); *see also* Cal. Water Code § 31150 (authorizing "County water districts" to contract with federal government under reclamation laws); Cal. Water Code § 35875 (authorizing "California water districts" to contract with federal government under reclamation laws); Cal. Water Code § 44000 (authorizing "California water

storage districts" to contract with federal government under reclamation laws); Cal. Water Code § 50970 (authorizing "reclamation districts" to contract with federal government under reclamation laws); Cal. Water Code § 74610 (authorizing "water conservation districts" to contract with federal government under reclamation laws).[4]

As the California Supreme Court has noted, in entering into contracts, performing them, and suing to enforce them, a water district is acting as a representative of its landowners and water users. *Coachella Valley County Water District v. Stevens*, 274 P. 538, 542 (Cal. 1929) ("[N]o good reason has been suggested why . . . the landowners and other water users in the district may not set up such a governmental agency to act in a representative capacity in their behalf.")

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[4] The Oregon legislature adopted similar legislation. *See* Or. Rev. Stat. § 545.511 (2004) (authorizing Board of Directors of irrigation districts to order that an election to authorize contracts with the United States); Or. Rev. Stat. § 547.355 (authorizing the board of supervisors of drainage districts to enter into reclamation contracts with the United States); Or. Rev. Stat. § 552.350 (authorizing Oregon "water improvement districts" to "cooperate with the United States in the manner provided by Congress for flood control, reclamation, conservation and allied purposes"); Or. Rev. Stat. § 553.710 (authorizing Oregon "water control districts" to enter into contracts for construction of works); Or. Rev. Stat. § 554.260 (authorizing the Board of Directors of Oregon corporations for irrigation, drainage, water supply or flood control to enter into a contract with the United States for maintenance and operation of any works).

As the Federal Circuit stated in finding that the water users are third-party beneficiaries of these contracts with the Bureau of Reclamation:

> The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree.

H.F. Allen Orchards v. United States, 749 F.2d 1571, 1576 (Fed Cir. 1984) (citations omitted).

II. Unlike Water Users Under Typical Utility Contracts, the Water Users Under Reclamation Act Contracts Hold a Property Right To Receive Project Water.

As the Federal Circuit explained in *H.F. Allen Orchards*, what makes the water delivery contract at issue in this case distinguishable from a typical utility contract is that the water users, the third-party beneficiaries, have constitutionally protected rights to the project water upon which the water delivery contracts between Reclamation and the water district are based. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed Cir. 1984) ("The irrigation districts, which contracted with Reclamation, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies.").[5]

In the seminal case on this issue, *Ickes v. Fox*, 300 U.S. 82 (1937), a suit by 160 of Washington's Yakima Project water users to enjoin the Secretary's threat to cut off their irrigation water, this Court rejected the government's argument that such water users' rights were defined solely by the Sunnyside Water Users' Association's water delivery contract with the United States. (Their third-party beneficiary status under the contract does not appear to have been questioned.) Holding that the reclamation project water users hold vested property rights to receive their water from Reclamation, quite apart from any contractual provision, this Court stated:

> Although the government diverted, stored, and distributed the water, the contention of

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[5] Indeed, the water delivery contracts at issue in this case are distinguishable from the contract at issue in *Klamath Water Users Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999), which was a contract to operate a dam to produce hydropower. *Klamath Water Users Ass'n v. Patterson*, 15 F. Supp.2d 990, 992 (D. Ore. 1998). In *Patterson*, the district court had recognized that plaintiffs' water rights derived from their water delivery contracts, not the 1956 hydropower contract: "The 1956 contract is not the source of plaintiffs' rights to water in the Klamath Basin. Rather, their water rights are found primarily in their individual repayment contracts with the federal government and in state water law." *Id.* at 996. The Ninth Circuit agreed.

petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. The government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefore, it was provided that the government should have a lien upon the lands *and the water rights* appurtenant thereto – a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner.

Id. at 94-95 (citations omitted).

This Court so declared because the Reclamation water right was appurtenant to the land:

> [I]t long has been established law that the right to the use of water can be acquired only by prior appropriation for beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied.

Id. at 95-96.

Next, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), an original proceeding to apportion the waters of the Platt River, the United States claimed ownership of waters impounded by the North Platt and Kendrick Act projects. Rejecting the United States' argument, this Court reiterated its *Ickes* holding that the water users (here represented by the state) held a property right in the reclamation project water:

> The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. Indeed [Section] 8 of the Reclamation Act provides as we have seen that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."
>
> * * *
>
> The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners.

Id. at 614-16 (citations omitted).

And, in *Nevada v. United States*, 463 U.S. 110 (1983), this Court prohibited the Bureau of Reclamation from depriving water users in Nevada's Newlands Project of their property right to receive water. This Court opened its analysis by stating: "We are bound to say that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.* at 121.

After reviewing its prior holdings in *Ickes* and *Nebraska*, this Court then stated:

> In the light of these cases, we conclude that the Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit. Once these lands were acquired by settlers in the Project, the Government's "ownership" of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land. As in *Ickes v. Fox* and *Nebraska v. Wyoming*, the law of relevant State and the contracts entered into by the landowners and the United States make this point very clear.

Id. at 126.

The United States itself has affirmed the vitality of these holdings that reclamation project water users own a property right in the project's water. *See* Filings of Claims for Water Rights in General Stream Adjudication, Op. Solicitor, Dep't of Interior, 97 Interior Dec. 21, 25; 1989 WL 506913 at *1, 5 (July 6, 1989) ("[T]he water user who puts the project water to beneficial use obtains a vested property interest in the water right."). This interpretation is entitled to great weight. *California v. United States*, 438 U.S. 645, 676 n.30 (1978).[6]

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[6] This Solicitor's Opinion is, in fact, binding on all Interior Department officials. As the Department of Interior, Department Manual states:

> A. The responsibilities of the Solicitor in 209 DM 3.1A include but are not limited to the authority:
>
> > (11) To issue final legal interpretations, in the form of M-Opinions published in *Decisions of the United States Department of the Interior*, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary.

Department of Interior, Departmental Manual, 209 DM 3.2, Authority in Specified Matters, *available at* http://elips.doi.gov/elips/release/3537.htm (last visited November 19, 2004). In *Kentucky Resources Council, Inc. v. Office of Surface Mining*, 155 IBLA 354 (2001), the Interior Department Board of Appeals stated that under this provision, it was bound to follow the analysis of a prior Interior Solicitor's Opinion: "Because we are

Petitioners hold water rights that entitle them to receive all the water from the reclamation project that they can beneficially use. CAL. CONST. Art. X, § 2. In Western water law, any right to the use of surface water for irrigation water is appurtenant to the land, subject to beneficial use. *Nevada v. United States*, 463 U.S. 110, 126 (1983) ("Once these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land.").

"The Supreme Court has determined that for water rights obtained by the Bureau in the name of the United States, the water user who puts the project water to beneficial use obtains a vested property interest in the water right." 97 Interior Dec. 21, 25; 1989 WL 506913 at *1, 5. The Solicitor's 1989 opinion comprehensively analyzes the property right in the water use arising from the beneficial use of the water:

> Since *Ickes v. Fox*, the principal that the proprietary interest in the project water right is in the project water users who put the water to beneficial use has been reaffirmed by the Supreme Court on two occasions. In *Nebraska v. Wyoming*, 325 U.S. 589 (1045), the Court . . . found that individual landowners who had put the project water to beneficial use, thereby "perfecting" the water right obtained by the United States, had "become the appropriators of the water rights, the United States being the storer and the carrier."
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> Finally, in *Nevada v. United States*, the Supreme Court addressed Government arguments that water decreed to the United States for the Newlands reclamation project in Nevada could be reallocated to an Indian reservation.
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> With the issuance of *Nevada v. United States*, the Supreme Court, conclusively reaffirmed the concept that beneficial ownership of reclamation project water right is in the water users who put the water to beneficial use.

97 Interior Dec. 21, 26-27; 1989 WL 506913 at *1, 6 (citations omitted).

Further, in connection with passage of the McCarran Amendment[7] in 1951, the Justice Department told the Senate

bound by the Solicitor's Opinion, as approved by the Secretary, see 209 DM 3.2A(11), we review the OSM Assistant Director's July 20, 1994, decision in accordance with the analysis in that Opinion." *Id.* at 355.

[7] The McCarran Amendment was enacted to permit the joinder of the United States as a party defendant in any suit for the adjudication of rights to the use of water. Act of July 10, 1952, § 208(d), 66 Stat. 560.

that the water users' water rights are compensable property rights:

> Mr. Veeder: Certainly they have a legal remedy in damages always where the United States has taken more water than it should have. The fifth amendment of the Constitution is the greatest guaranty to a water user that he is not going to be damaged.
> Senator Watkins: How can he enforce it?
> Mr. Veeder: He simply goes into the Federal district court and sues the United States if it is not over $10,000. If it is over $10,000 he goes to the Court of Federal Claims. We are confronted with that all the time. The Gerlach case [*United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950)] is a historic case. They came in and sued us and we paid them.
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> * * *
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> Senator Watkins: Suppose it interferes substantially with the rights of others when they impound it? If it does, what happens then?
> Mr. Veeder: I think, then, if any act that we do transgresses the rights of any individual, in my estimation the fifth amendment protects them completely, and they can sue us.

A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights Before a Subcommittee of the Committee on the Judiciary of the United States Senate, 82nd Cong. (Apr. 25, Aug. 3 and 8, 1951) (statement of William H. Veeder, Special Assistant to Attorney General, DOJ).

Thus, as the Government has previously conceded on numerous occasions, water users' rights in this water are compensable property, and the very legislative scheme that permits the government to contract with irrigation districts was created specifically to help landowners manage that property. The Fifth Amendment requires that those landowners have the ability to vindicate the taking of those property rights by an action for just compensation. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding state constitutionally required to provide just compensation remedy); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (holding plaintiff had right to jury trial to determine just compensation).

III. As Beneficial Owner of the Water Right and Beneficial User of the Water, the Irrigator Must Be Provided a Legal Process To Vindicate This Right.

In California, as in the other western states, "[a]ll water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law." Cal. Water Code § 102 (2004). Thus, the term "water right" denotes the

legal right in California "to use the water." *Fullerton v. State Water Resources Control Board*, 90 Cal. App. 3d 590, 598 (1979); *Rancho Santa Margarita v. Vail*, 81 P.2d 533, 11 Cal.2d 501, 554-55 (1938); *Eddy v. Simpson,* 3 Cal. 249, 252 (1853).

Since 1914, the manner provided by California law for the acquisition of surface water rights has been appropriation by the State Water Resources Control Board and its predecessors, which possess sole authority to grant rights to divert and store appropriated surface water in California. Cal. Water Code §§ 1201, 1202, 1225; *see also* Cal. Water Code § 1253 ("The board shall allow the appropriation for beneficial purposes of unappropriated water under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated.").

Because water is a scarce commodity, California, like the other Western states, has adopted the doctrine of beneficial use, which "prohibits waste of water, requires reasonableness of use, method of use, and method of diversion for all uses of water. . . .To the extent the use is wasteful or otherwise unreasonable, it is not part of a water right." Arthur L. Littleworth & Eric L. Garner, *California Water* 28 (1995). Under this doctrine it is the water users, not Reclamation, who make beneficial use of the irrigation

water, and this is the *sine qua non* of the water right permits issued by the California State Water Board. *See, e.g., California v. United States,* 438 U.S. 645, 650-52 (1978) ("If the term "cooperative federalism" had been in vogue in 1902, the Reclamation Act of that year would surely have qualified as a leading example of it. . . . The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.").

Congress, in the Reclamation Act itself, established that:

> The right to the use of water acquired under the provision of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of 1902, ch. 1093 § 8, 32 Stat. 388 (1902) (amended and codified in 43 U.S.C. § 372 (2003)).

Accordingly, in *Ickes*, this Court determined that an arbitrary contractual limit on the quantity of water to be delivered to Yakima Project irrigators was superceded by the beneficial use rule embedded in both the Reclamation Act and state law because "Under the Reclamation Act, . . . as well as under the law of Washington, 'beneficial use' was

'the basis, the measure, and the limit of the right.'" *Ickes v. Fox*, 300 U.S. 82, 94 (1937) (citation omitted).

On remand, the D.C. Circuit Court of Appeals expanded on this holding:

> The water-rights of appellants are not determined by contract but by beneficial use. The Secretary of the Interior in operating the project is in the position of a carrier of water to all entrymen in the Reclamation project. He is not obligated to furnish any more water than is available. Under the Reclamation Act he is not authorized to furnish any water at all except for beneficial use. He must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington.

Fox v. Ickes, 137 F.2d 30, 33 (D.C. Cir. 1943).

As the Interior Solicitor noted in 1989, "Since *Ickes v. Fox*, the principle that the proprietary interest in the project water right is in the project water users who put the water to beneficial use has been reaffirmed by the Supreme Court on two occasions." 97 Interior Dec. 21, 26; 1989 WL 506913 at *1, 6. The Interior Solicitor also stated that "[w]ith the issuance of *Nevada v. United States*, the Supreme Court, conclusively reaffirmed the concept that beneficial ownership of a reclamation project water right is in the water users who

put the water to beneficial use." 97 Interior Dec. 21, 27; 1989 WL 506913 at *1, 6.

With respect to the Government's mere legal title to project water, the Interior Solicitor observed:

> At first glance, the pronouncement of the Supreme Court in *Ickes* and *Nebraska* would appear to indicate that upon application by water users of project waters to beneficial uses, all interests incident to the water right flow to the project water users. However, as pointed out in *Nebraska v. United States*, these cases "discuss[] the beneficial ownership of water rights in irrigation projects build pursuant to the Reclamation Act." *Nevada* likewise clarifies that where project water rights are obtained by and remain in the name of the United States, the Federal Government retains legal title. This point is important because the Court in *Nevada* speaks of "obligations that necessarily devolve upon [the United States] from having mere title to water rights . . ."

97 Interior Dec. 21, 27; 1989 WL 506913 at *1, 6 (citations omitted). After recognizing the limited claim the United States had to this water, the Solicitor noted the obligations incumbent upon the Government by virtue of possession of that title:

> First, it appears clear that the Court in *Nevada* was referring to the obligation of this Department to obtain necessary water rights for authorized projects pursuant to

section 8 [of the Reclamation Act]. The Court, in reviewing the dual responsibilities that Congress placed upon the Secretary to represent Indian interest and also obtain project water rights stated: " . . . Congress has imposed upon the United Stats in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects . . ."

Beyond the obligation to obtain water, we also find support in *Nevada* for the proposition that the United States is obligated at least to do what is necessary to preserve, maintain, protect, or have confirmed project water rights that are held in the name of the United States. While less explicit than the obligation to obtain initially the water right, we believe the Court's further discussion of the United States' general obligations to deliver water to the beneficial owners of project water rights indicates this result. In *Nevada*, the Court specifically held that the Government could not reallocate project water in a manner that would impair its obligation as legal titleholder to deliver project water to project beneficiaries . . . .

97 Interior Dec. 21, 27-28; 1989 WL 506913 at *1, 7 (citations omitted).

The Federal Government opened its brief in *Nevada* by stating: "The court of appeals has simply permitted a reallocation of the water decreed in Orr Ditch to a single party – the United States – from reclamation uses to a

Reservation use with an earlier priority." In rejecting the Government's position, the Court pointed out that the argument that water decreed to the United States in the Orr Ditch decree for project purposes could be reallocated away from those purposes, "seems wholly to ignore . . . the obligations that necessarily devolve upon [the United States] from having mere title to water rights for the Newlands Project, when the beneficial ownership of these water rights resides elsewhere." Thus, in attempting to reallocate water away from the project, the Federal Government was ignoring and failing to meet its obligation, as titleholder of the project water right, to maintain the project water supply in the amount which had previously been decreed to the project and to which the water users had acquired beneficial ownership.

97 Interior Dec. 21, 28; 1989 WL 506913 at *1, 7 (citations omitted).

In sum, Reclamation is constrained by the fact that title to the water is divided. As noted, the federal government retains only legal title to reclamation water. *Nevada v. United States*, 463 U.S. 110, 127 (1983); 97 Interior Dec. 21, 29, 1989 WL 506913 at *1, 8. Reclamation is not the beneficial user of the water, a point that it has long-since conceded. That beneficial interest in the water is a vested property right appurtenant to petitioners' lands, and beneficial use is the "measure and limit" of that right.

Therefore, because the law recognizes both the beneficial interest and the property interest of landowners in the water (of which they make beneficial use), the Fifth Amendment requires a procedure by which that right can be vindicated. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution.").

CONCLUSION

For all of these reasons, *amici curiae* urge this Court to reverse the decision below.

Respectfully submitted,

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